MANUAL OF

MODEL

CRIMINAL

JURY INSTRUCTIONS

For the

District Courts of the Eighth Circuit

Prepared by

Committee on Model

Criminal Jury Instructions

Within the Eighth Circuit

_____

Revised July, 1989

TO THE JUDGES AND MEMBERS OF THE BAR
OF THE EIGHTH JUDICIAL CIRCUIT

Dear Ladies and Gentlemen:

The Eighth Circuit Judicial Committee on Jury Instructions herewith submits its Manual of Model Criminal Jury Instructions (1989 Edition). It supersedes all prior editions.

The purpose of this Manual is stated in its introduction. We recognize that the manner of instructing a jury varies widely among judges, but these models are offered as clear, brief and simple instructions calculated to maximize jury comprehension. They are available to the judges and the litigants to be used in their discretion in tailoring the instructions in a particular case. These are intended to be model, not mandatory, instructions and should be modified as appropriate to more clearly and precisely present issues to the jury.

Although the Eighth Circuit cannot give prior approval to the instructions, we are grateful for the support that they have provided to us in this endeavor. We are also grateful to the judges, lawyers, prosecutors and federal practice committees throughout the Circuit who have provided advice and input into the outstanding work of its Criminal Jury Instructions Subcommittee. This subcommittee drafted the vast majority of these instructions, notes, and committee comments. They met regularly for the past two years and the substantial contribution they made is obvious from the instructions which are included. The names and addresses of the committee and subcommittee members are attached.

We also express special thanks to Kathianne K. Crane for her dedication to this project. She personally did vast amounts of research and rewriting of comments to incorporate the latest cases and she resolved disputes between other committee members. She also edited all of these instructions, notes, and comments to assure a consistent format and style. She did far more than her share of work and we would not have completed nearly as many instructions without her dedication.

The Criminal Division support staff of the United States Attorney's Office, Eastern District of Missouri, typed, retyped, copied, recopied, and provided all of the other support necessary for production of these instructions. They were frequently called upon to do major revisions in a short time, and they cheerfully dedicated their time and efforts to this project-even though this sometimes involved working overtime and weekends. That support was invaluable.

These instructions have been prepared for you in looseleaf form so that changes in instructions can be replaced or added and the Manual can be more effectively and efficiently maintained. The Committee plans to continue in operation and to add instructions on the substantive law for offenses that are frequently tried in the Eighth Circuit. As these instructions are used, if a judge or lawyer believes improvement can be made in the clarity of any instruction, or that a particular instruction is in error, we would appreciate being advised.

The members of the Committee sincerely hope these instructions will be of some help to the judges in their communications with the jury, thereby improving the quality of justice we all endeavor to attain.

This volume is dedicated to the Honorable Ross T. Roberts, who was reporter for this project for many years. A dedication page is included herein.

Respectfully submitted,

Scott 0. Wright, Chairman

July, 1989

DEDICATION

The Committee is honored to dedicate these instructions to Judge Ross T. Roberts. Ross was the Reporter for the Committee and he was relied on very heavily from the very outset in the formulation of these instructions. Because Ross had such a brilliant legal mind, his work and input on the Committee was highly valued by all of its members.

It is a great privilege for the Committee to recognize Ross' work on the Instruction Committee and dedicate these Instructions to his memory.

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INTRODUCTION

These instructions have been prepared to help judges communicate more effectively with juries. The Manual is meant to provide judges and lawyers with models of clear, brief and simple instructions calculated to maximize juror comprehension. They are not intended to be treated as the only method of properly instructing a jury. See United States v. Ridinger, 805 F.2d 818, 821 (8th Cir. 1986). "The Model Instructions . . . are not binding on the district courts of this circuit, but are merely helpful suggestions to assist the district courts." United States v. Norton, 846 F.2d 521, 525 (8th Cir. 1988).

Every effort has been made to assure conformity with current Eighth Circuit law, however, it cannot be assumed that all of these model instructions in the form given will necessarily be appropriate under the facts of a particular case. The Manual covers issues on which instructions are most frequently given, but because each case turns on unique facts, instructions should be drafted or adapted to conform to the facts in each case.

In drafting instructions, the Committee has attempted to use simple language, short sentences, and the active voice and omit unnecessary words. We have tried to use plain language because giving the jury the statutory language, or language from appellate court decisions, is often confusing.

It is our position that instructions should be as brief as possible and limited to what the jury needs to know for the case. We also recommend sending a copy of the instructions as given to the jury room.

Counsel are reminded of the dictates of Criminal Rule 30 which provides "[n]o party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objection" (Emphasis added). See, United States v. Hecht, 705 F.2d 976, 978 (8th Cir. 1983). Simply offering instructions without making specific objections does not satisfy Rule 30. United States v. Hecht, Id., at pp. 978-979. Moreover, merely offering a requested instruction to the trial judge for his consideration is not sufficient to preserve an error based on a judge's failure subsequently to use the request. United States v. Hecht, Id., at 978-979. A requested

instruction must set out a correct declaration of law and be supported by the evidence. United States v. Brake, 596 F.2d 337, 339 (8th Cir. 1979).

DIRECTIONS FOR USE

The suggested instructions in this volume do not attempt to take into account all of the variations of a particular statute or all of the factual variations that may occur in a particular trial. The instruction models detailed herein will have to be modified in particular cases to reflect these variations.

In some of the Comments and Notes, the Committee has used terminology such as "should be given" or "should be defined." Unless there is case law requiring such, this does not mean that it would be error not to give or define the suggested instruction or that the suggested instruction would be appropriate in every context. Rather the use of such terms simply means that it is the Committee's belief that to achieve clarity, completeness or consistency such an instruction would be appropriately given.

Further, in some factual situations, it may be helpful to define certain terms or concepts which the Committee has not defined. In this regard, the Committee Comments may be helpful in finding proper definitions of these terms and concepts.

The Committee Comments are meant to be helpful but not all inclusive. No significance is to be given to the inclusion or exclusion of any matter in the Comments.

Brackets [ ] are used to indicate words, phrases or sentences which should be used or eliminated in accordance with the actual charges in the individual case.

Example:

> "One, the defendant made a [false] [fictitious] [fraudulent] [statement] [representation] in a matter, etc."

Where more than one manner of violating a statute is charged, the disjunctive "or" should be used in the instructions:

> "One, the defendant made a false, fictitious or fraudulent statement or representation in a matter, etc."

However, if defendant was charged only with making false statements, the instruction would read:

> "One, the defendant made a false statement in a matter, etc."

Parentheses ( ) are used to indicate a direction to insert some specific matter at that point in the instruction. This is usually factual matter particular to a given case.

Numbered footnotes to portions of the instructions are set out under "Notes on Use" which follows "Committee Comments" for each instruction.

CITATIONS TO OTHER MANUALS OF JURY INSTRUCTIONS

The Committee has abbreviated its references to other manuals of jury instructions as follows:

1. D. & B. § ____	E. Devitt & C. Blackmar, Federal Jury Practice & Instructions (3rd Edition 1977)
2. D. & B. § ____ (Cum. Supp. 1987)	E. Devitt & C. Blackmar, Federal Jury Practice & Instructions, Cumulative Supplement (1987).
3. Fifth Circuit [Basic] [Special] [Offense] [Trial] Instruction ____	Pattern Jury Instructions, Criminal Cases, U.S. Fifth Circuit District Judges Association (1983)
4. Seventh Circuit [II] [III] [Instruction ____] [Ch. ____ p. ____]	Federal Criminal Jury Instructions of the Seventh Circuit 1980), Volume II (1983) and Volume III (1986)
5. Ninth Circuit Instruction _____	Manual of Model Jury Instructions for the Ninth Circuit (1985)
6. Eleventh Circuit [Basic] [Special] [Offense] [Trial] Instruction _____	Pattern Jury Instructions, Criminal Cases, U.S. Eleventh Circuit District Judges Association (1985)
7. S. & P. § _____	S. Saltzburg and H. Perlman, Federal Criminal Jury Instructions (1985)
8. F.J.C. Instruction _____	Federal Judicial Center Committee to Study Criminal Jury Instructions

TABLE OF CONTENTS

PART I - MODEL INSTRUCTIONS

SECTION 1: PRELIMINARY INSTRUCTIONS BEFORE OPENING STATEMENTS

SECTION 2: INSTRUCTIONS FOR USE DURING TRIAL

SECTION 6: FINAL INSTRUCTIONS: ELEMENTS OF OFFENSES

6.18.471 Counterfeiting
(18 U.S.C. § 471)

6.18.472 Passing Counterfeit Obligations
(18 U.S.C. § 472)

6.18.495A Forgery
(18 U.S.C. § 495)
(First Paragraph)

6.18.495B Uttering a Forged Writing
(18 U.S.C. § 495)
(Second Paragraph)

6.18.641 Theft of Government Money or Property
(18 U.S.C. § 641)

6.18.656 Embezzlement and Misapplication
Of Bank Funds
(18 U.S.C. § 656)

6.18.659A Theft From Interstate Shipment
(18 U.S.C. § 659)
(First Paragraph)

6.18.659B Purchase, Receipt or Possession of Property
Stolen From An Interstate Shipment
(18 U.S.C. § 659)
(Second Paragraph)

6.18.751 Escape From Custody
(18 U.S.C. § 751)

6.18.912 Impersonation of a Federal Officer
Or Employee
[Acting As] [Demanding Something of Value]
(18 U.S.C. § 912)

6.18.922 Felon in Possession of Firearm
(18 U.S.C. § 922(g))

6.18.924 Firearms - Crime of Violence/Drug Trafficking
(18 U.S.C. § 924(c))

6.18.1001A Concealing a Material Fact
From a Government Agency
(18 U.S.C. § 1001)

6.18.1001B False Statement to Government Agency
(18 U.S.C. § 1001)

PRELIMINARY INSTRUCTIONS BEFORE OPENING STATEMENTS

1.00 INTRODUCTORY COMMENT

Preliminary instructions are given at the beginning of trial prior to opening statements to help orient the jurors to their function in that trial by explaining the nature and scope of the jury's duties, listing some of the basic ground rules and identifying the issues to be decided. See generally, United States v. Bynum, 566 F.2d 914, 923-24 (5th Cir.), cert. denied, 439 U.S. 840 (1978). Preliminary instructions are not a substitute for final instructions. United States v. Ruppel, 666 F.2d 261, 274 (5th Cir.), reh. denied, 671 F.2d 1378 (5th Cir.), cert. denied, 458 U.S. 1107 (1982), reh. denied, 458 U.S. 1132 (1982).

In addition to the preliminary instructions set out in this manual, other examples of preliminary instructions can be found in Devitt & Blackmar, Sections 10.01-10.14; Fifth Circuit Trial Instruction 1; Ninth Circuit Instructions 1.01-1.13; Eleventh Circuit Trial Instructions 1.1, 1.2, 2.1 and 2.2; F.J.C. Instructions 1-4. Some of these cover matters not addressed in this manual, such as sequestration, pretrial publicity, and questions from the jury.

1.01 GENERAL: NATURE OF CASE; NATURE OF INDICTMENT; BURDEN OF PROOF; PRESUMPTION OF INNOCENCE; DUTY OF JURY; CAUTIONARY

Ladies and gentlemen: I shall take a few moments now to give you some initial instructions about this case and about your duties as jurors. At the end of the trial I shall give you further instructions. I may also give you instructions during the trial. Unless I specifically tell you otherwise, all such instructions - both those I give you now and those I give you later - are equally binding on you and must be followed.

This is a criminal case, brought against the defendant[s] by the United States Government. The defendant[s] [is] [are] charged with _____ _____.[1] [That charge is] [Those charges are] set forth in what is called an indictment[,] [which reads as follows: (insert)] [which I will summarize as follows: (insert)] [which I will ask the government attorney to summarize for you].[2] You should understand that an indictment is simply an accusation. It is not evidence of anything. The defendant[s] [has] [have] pleaded not

guilty, and [is] [are] presumed to be innocent unless and until proved guilty beyond a reasonable doubt.[3]

It will be your duty to decide from the evidence whether [the] [each] defendant is guilty or not guilty of the crime[s] charged. From the evidence, you will decide what the facts are. You are entitled to consider that evidence in the light of your own observations and experiences in the affairs of life. You may use reason and common sense to draw deductions or conclusions from facts which have been established by the evidence. You will then apply those facts to the law which I give you in these and in my other instructions, and in that way reach your verdict. You are the sole judges of the facts; but you must follow the law as stated in my instructions, whether you agree with it or not.

Do not allow sympathy or prejudice to influence you. The law demands of you a just verdict, unaffected by anything except the evidence, your common sense, and the law as I give it to you.

You should not take anything I may say or do during the trial as indicating what I think of the evidence or what I think your verdict should be.

Finally, please remember that only [this defendant] [these defendants], not anyone else, [is] [are] on trial here, and that [this defendant] [these defendants] [is] [are] on trial only for the crime[s] charged, not for anything else.

COMMITTEE COMMENTS

See Introductory Comment § 1.00, supra.

NOTES ON USE

[1]The description of the offense should not track statutory language, but rather should be a simple, general statement (e.g., "unlawfully importing cocaine;" "embezzling bank funds"). Statutory citations are unnecessary.

[2]Depending on the length and complexity of the indictment and the individual practices of each district judge, the indictment may be read, summarized by the court, summarized by the prosecutor or not read or summarized depending on what is necessary to assist the jury in understanding the issues before it.

[3]A brief summary of the defense may be included here if requested by defendant.

1.02 ELEMENTS OF THE OFFENSE (PRELIMINARY)

[In order to help you follow the evidence, I will now give you a brief summary of the elements of the crime[s] charged, which the government must prove beyond a reasonable doubt to make its case:

One, _____

Two, _____

Three; etc. _____

You should understand, however, that what I have just given you is only a preliminary outline. At the end of the trial I shall give you a final instruction on these matters. If there is any difference between what I just told you, and what I tell you in the instructions I give you at the end of the trial, the instructions given at the end of the trial must govern you.]

COMMITTEE COMMENTS

See D. & B. § 10.01; F.J.C. Instruction 1, Commentary; Ninth Circuit Instruction 1.02.

This is an optional instruction; and some care should be exercised in using it. The Committee recommends that it not be utilized unless there has first been a discussion with counsel concerning any problems that it might present.

NOTES ON USE

[1]List the essential elements of the offense charged in the indictment. If more than one offense is charged, each offense should be referred to separately (e.g.: "As to Count I, which charges _____, the elements are: _____"). Statutory citations are unnecessary. For guidance in framing the elements, see § 3.09 and Section 6, infra.

1.03 EVIDENCE; LIMITATIONS

I have mentioned the word "evidence." "Evidence" includes the testimony of witnesses, documents and other things received as exhibits, any facts that have been stipulated--that is, formally agreed to by the parties, and any facts that have been judicially noticed--that is, facts which I say you may, but are not required to, accept as true, even without evidence.

Certain things are not evidence. I shall list those things for you now:

1. Statements, arguments, questions and comments by lawyers representing the parties in the case are not evidence.

2. Objections are not evidence. Lawyers have a right to object when they believe something is improper. You should not be influenced by the objection. If I sustain an objection to a question, you must ignore the question and must not try to guess what the answer might have been.

3. Testimony that I strike from the record, or tell you to disregard, is not evidence and must not be considered.

4. Anything you see or hear about this case outside the courtroom is not evidence, unless I specifically tell you otherwise during the trial.

Furthermore, a particular item of evidence is sometimes received for a limited purpose only. That is, it can be used by you only for one particular purpose, and not for any other purpose. I will tell you when that occurs, and instruct you on the purposes for which the item can and cannot be used.

Finally, some of you may have heard the terms "direct evidence" and "circumstantial evidence." You are instructed that you should not be concerned with those terms. The law makes no distinction between direct and circumstantial evidence. You should give all evidence the weight and value you believe it is entitled to receive.

COMMITTEE COMMENTS

See D. & B. § 10.01; § 15.02; F.J.C. Instruction 1; Ninth Circuit Instructions 1.04, 1.05, 1.06, 1.07.

See also, Instruction 3.03, infra.

Stipulated facts and judicially noticed facts are further explained in Instructions 2.02, 2.03 and 2.04, infra. The Committee recommends giving the appropriate one of those instructions the first time evidence is received either by way of stipulation or judicial notice, even though a brief definition is in this instruction.

1.04 DIRECT AND CIRCUMSTANTIAL EVIDENCE

[See final paragraph of § 1.03.]

COMMITTEE COMMENTS

See, Ninth Circuit Instruction 1.06 and F.J.C. Instruction 1 for examples of a direct and circumstantial evidence instruction as part of the preliminary instructions. See further D. & B. § 15.02 the substance of which was approved in United States v.Kirk, 534 F.2d 1262, 1279 (8th Cir. 1976), cert. denied, 433 U.S. 907 (1977). See also Fifth Circuit Basic Instruction 5; Seventh Circuit Instruction 3.02; Eleventh Circuit Basic Instructions 4.1 and 4.2.

The Committee believes that the last paragraph of Instruction 1.03 is sufficient and that in the ordinary case it is unnecessary to attempt to define or distinguish direct and circumstantial evidence.

1.05 CREDIBILITY OF WITNESSES

In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness said, or only part of it, or none of it.

[In deciding what testimony of any witness to believe, consider the witness's intelligence, the opportunity the witness had to have seen or heard the things testified about, the witness's memory, any motives that witness may have for testifying a certain way, the manner of the witness while testifying, whether that witness said something different at an earlier time, the general reasonableness of the testimony, and the extent to which the testimony is consistent with other evidence that you believe].[1]

COMMITTEE COMMENTS

See D. & B. § 10.01; Seventh Circuit Instruction 1.02; Ninth Circuit Instruction 1.09; See generally, West Key # "Criminal Law" 785(1-16).

See also, Instruction 3.04, infra.

Such factors may be considered by the jury in determining the credibility of the witness. Clark v. United States, 391 F.2d 57, 60 (8th Cir.), cert. denied, 393 U.S. 873 (1968). In United States v. Phillips, 522 F.2d 388, 390, n.3 (8th Cir. 1975) the trial court gave an even more detailed instruction on such factors as part of its preliminary instructions:

"In considering the weight and value of the testimony of any witness you may take into consideration the appearance, attitude and behavior of the witness, the interest of the witness in the outcome of the case, the relation of the witness to the government or any of the defendants, the inclination of a witness to speak truthfully or not, the probability of the witness' statements, and all other facts and circumstances in evidence. Thus, you may give the testimony of any witness just such weight and value as you may believe the testimony of such witness is entitled to receive." (Emphasis omitted.)

In the final charge in Phillips, a more detailed credibility instruction was given to the jury.

NOTES ON USE

[1]Whether the court wishes to include this language or other additional detail in its preliminary instructions is optional.

1.06 NO TRANSCRIPT AVAILABLE [; NOTE TAKING]

At the end of the trial you must make your decision based on what you recall of the evidence. You will not have a written transcript to consult, and the court reporter cannot read back lengthy testimony. You must pay close attention to the testimony as it is given.

[If you wish, however, you may take notes to help you remember what witnesses said. If you do take notes, please keep them to yourself until you and your fellow jurors go to the jury room to decide the case. And do not let note-taking distract you so that you do not hear other answers by the witness.]

[Your notes should be used only as memory aids. You should not give your notes precedence over your independent recollection of the evidence. If you do not take notes, you should rely on your own independent recollection of the proceedings and you should not be influenced by the notes of other jurors. I emphasize that notes are not entitled to any greater weight than the recollection or impression of each juror as to what the testimony might have been.]

[When you leave at night, your notes will be secured and not read by anyone.][1]

COMMITTEE COMMENTS

See Ninth Circuit Instructions 1.11 and 1.12. See also, D. & B. §§ 10.05 and 10.06; F.J.C. Instruction 3; Eleventh Circuit Trial Instructions 1.2, 2.1 and 2.2; United States v. Rhodes, 631 F.2d 43, 46 n.3 (5th Cir. 1980). See generally West Key # "Criminal Law" 855(1).

Both the unbracketed and bracketed portions of this instruction are optional. The unbracketed portion may help keep jurors attentive and may discourage requests for lengthy readbacks of testimony. The practice of restricting the reading back of testimony is discretionary. United States v. Ratcliffe, 550 F.2d 431, 434 (9th Cir. 1976).

There is considerable controversy over the subject of juror note taking. It is within the discretion of the trial judge to permit that practice. United States v. Anthony, 565 F.2d 533, 536 (8th Cir. 1977), cert. denied, 434 U.S. 1079 (1978); United States v. Rhodes, supra, 631 F.2d at 45.

If notetaking is permitted, an instruction should be given concerning the use of notes during deliberations. United States v. Rhodes, supra, 631 F.2d at 46 and n.3.

NOTES ON USE

[1]The court may wish to describe the method to be used for safekeeping.

1.07 BENCH CONFERENCES AND RECESSES

During the trial it may be necessary for me to talk with the lawyers out of the hearing of the jury, either by having a bench conference here while the jury is present in the courtroom, or by calling a recess. Please understand that while you are waiting, we are working. The purpose of these conferences is to decide how certain evidence is to be treated under the rules of evidence, and to avoid confusion and error. We will, of course, do what we can to keep the number and length of these conferences to a minimum.

COMMITTEE COMMENTS

See F.J.C. Instruction 1; Fifth Circuit Trial Instruction 1; Ninth Circuit Instruction 2.02; Eleventh Circuit Trial Instructions 1.1 and 1.2.

1.08 CONDUCT OF THE JURY

Finally, to insure fairness, you as jurors must obey the following rules:

First, do not talk among yourselves about this case, or about anyone involved with it, until the end of the case when you go to the jury room to decide on your verdict.

Second, do not talk with anyone else about this case, or about anyone involved with it, until the trial has ended and you have been discharged as jurors.

Third, when you are outside the courtroom do not let anyone tell you anything about the case, or about anyone involved with it [until the trial has ended and your verdict has been accepted by me]. If someone should try to talk to you about the case [during the trial], please report it to me.

Fourth, during the trial you should not talk with or speak to any of the parties, lawyers or witnesses involved in this case -- you should not even pass the time of day

with any of them. It is important not only that you do justice in this case, but that you also give the appearance of doing justice. If a person from one side of the lawsuit sees you talking to a person from the other side -- even if it is simply to pass the time of day -- an unwarranted and unnecessary suspicion about your fairness might be aroused. If any lawyer, party or witness does not speak to you when you pass in the hall, ride the elevator or the like, it is because they are not supposed to talk or visit with you.

Fifth, do not read any news stories or articles about the case, or about anyone involved with it, or listen to any radio or television reports about the case or about anyone involved with it. [In fact, until the trial is over I suggest that you avoid reading any newspapers or news journals at all, and avoid listening to any TV or radio newscasts at all. I do not know whether there might be any news reports of this case, but if there are you might inadvertently find yourself reading or listening to something before you could do anything about it. If you want, you can have your spouse or a friend clip out any stories and set them aside to give you after the trial is over. I can assure you, however, that by the time you have heard the evidence in this case you will know more about the matter than anyone will learn through the news media.][1]

Sixth, do not do any research or make any investigation about the case on your own.

Seventh, do not make up your mind during the trial about what the verdict should be. Keep an open mind until after you have gone to the jury room to decide the case and you and your fellow jurors have discussed the evidence.

COMMITTEE COMMENTS

See Ninth Circuit Instruction 1.10; Devitt & Blackmar § 10.14; F.J.C. Instruction 1. See generally West Key # "Criminal Law" 1174(1) for cases on the conduct and deliberations of the jury.

A similar instruction should be repeated before the first recess, and as needed before other recesses (for example, before a weekend recess). See Instruction 2.01, infra, for a form of instruction before recesses. See also Committee Comments § 2.01 regarding the necessity of instructions relating to recesses.

NOTES ON USE

[1]Optional for those cases in which media coverage is expected.

1.09 OUTLINE OF TRIAL

The trial will proceed in the following manner:

First, the government attorney will make an opening statement. [Next the defendant's attorney may, but does not have to, make an opening statement.][1] An opening statement is not evidence but is simply a summary of what the attorney expects the evidence to be.

The government will then present its evidence and counsel for defendant may cross-examine. [Following the government's case, the defendant may, but does not have to, present evidence, testify or call other witnesses. If the defendant calls witnesses, the government counsel may cross-examine them.][2]

After presentation of evidence is completed, the attorneys will make their closing arguments to summarize and interpret the evidence for you. As with opening statements, closing arguments are not evidence. The court will instruct

you further on the law. After that you will retire to deliberate on your verdict.

COMMITTEE COMMENTS

See Ninth Circuit Instruction 1.13; Eleventh Circuit Trial Instructions 1.1 and 1.2; F.J.C. Instruction 1; D. & B. § 10.01.

NOTES ON USE

[1]This sentence may be omitted if defendant so requests.

[2]These sentences may be omitted if defendant so requests.

INSTRUCTIONS FOR USE DURING TRIAL

2.00 INTRODUCTORY COMMENT

The instructions included in this Section are those the Committee felt were most likely to be given during trial, to limit or explain evidence, to advise the jury of its duties, or to cure or avoid prejudice. An instruction bearing on the jury's duties during recesses is contained in Instruction 2.01. Instructions explaining various kinds of evidence include Instructions 2.02 - 2.07.

Limiting instructions must be given, if requested, where evidence is admissible for one purpose, but not for another purpose, or against one defendant but not another. Fed. R. Evid. 105. Although it may be the better practice to give such an instruction sua sponte, this circuit has made it clear that the district court is not required to give a limiting instruction unless counsel requests one. Roth v. Black & Decker, U.S., Inc., 737 F.2d 779, 792-83 (8th Cir. 1984).

The district court has discretion in deciding whether to give limiting instructions, but when it does, it should instruct the jury as to the limited purpose for which the evidence is received. United States v. Robinson, 774 F.2d 261, 272 (8th Cir. 1985). Limiting instructions include Instructions 2.08 - 2.19.

Curative instructions are used to avoid or cure possible prejudice that may arise from a variety of situations occurring during trial. See, e.g. United States v. Sopczak, 742 F.2d 1119, 1122 (8th Cir. 1984) [witness mentioned defendant had changed plea from guilty to not guilty]; United States v. Martin, 706 F.2d 263, 266 (8th Cir. 1983) [court's reference to defendants as "pimps"]; United States v. Singer, 660 F.2d 1295, 1304-05 (8th Cir. 1981), cert. denied, 454 U.S. 1156 (1982) [prosecutor's comments during closing argument]; United States v. Smith, 578 F.2d 1227, 1236 (8th Cir. 1978) [codefendant's disruptive conduct at trial]; United States v. Leach, 429 F.2d 956, 963 (8th Cir. 1970), cert. denied, 402 U.S. 986 (1971) [witness characterized defendant's remark as "vulgar"]. Curative instructions include Instructions 2.20 - 2.22.

The court has discretion to refuse a curative instruction where the effect may be to amplify the event rather than dispel prejudice. See, e.g., United States v.

Wyant, 576 F.2d 1312, 1319 (8th Cir. 1978).

Other Instructions dealing with evidentiary matters are found in Section 4. Any of those evidentiary instructions may easily be adapted for use during trial where appropriate. Other examples of instructions which may be given during trial are in D. & B. §§ 10.14 - 10.20; F.J.C. Instructions 5 - 8; Fifth Circuit Trial Instructions 2 - 6; Ninth Circuit Instructions 2.01 - 2.12; Eleventh Circuit Trial Instructions 3 - 6.

The Committee recommends that any instruction which is given during trial be repeated in the court's final instructions given at the end of trial, unless valid reasons are presented to the court for doing otherwise.

2.01 DUTIES OF JURY: RECESSES[1]

We are about to take [our first] [a] recess[2] and I remind you of the instruction I gave you earlier. During this recess or any other recess, you must not discuss this case with anyone, including your fellow jurors, members of your family, people involved in the trial, or anyone else. If anyone tries to talk to you about the case, please let me know about it immediately. [Do not read, watch or listen to any news reports of the trial. Finally, keep an open mind until all the evidence has been received and you have heard the views of your fellow jurors.

I may not repeat these things to you before every recess, but keep them in mind throughout the trial.][3]

COMMITTEE COMMENTS

See D. & B. § 10.14; F.J.C. Instruction 5; Ninth Circuit Instruction 2.01.

See also, Instruction 1.08, supra.

The court has considerable discretion to separate a jury before it has reached a verdict. United States v. Williams, 635 F.2d 744, 745 (8th Cir. 1980) and cases cited therein. However the jury must be admonished as to their duties and responsibilities when not in court. Such an instruction may be given at the beginning of trial, before recesses and lunchtime, and most importantly before separating for the evening. Id. Although failure to give any instruction of this nature during the course of a trial which was completed in one day has been held harmless error,

Morrow v. United States, 408 F.2d 1390 (8th Cir. 1969), it is prejudicial error to allow the jury to separate overnight without a cautionary instruction having been given at any stage of the trial prior to separation. Williams, supra, 635 F.2d at 746. However, the failure to give a cautionary instruction prior to an overnight separation was held not reversible error, absent any other claim of prejudice where the jury had been so cautioned on at least thirteen other occasions. United States v. Weatherd, 699 F.2d 959, 962 (8th Cir. 1983). See also, United States v. McGrane, 746 F.2d 632 (8th Cir. 1984) holding that the jury was adequately cautioned when they were so instructed on ten occasions.

See Instruction 3.12, infra, for final instructions on this topic.

NOTES ON USE

[1]This instruction should be given before the first recess and at subsequent recesses within the discretion of the court.

[2]This language should be modified for overnight or weekend recesses.

[3]This language may be omitted for subsequent breaks during trial, but not for overnight or weekend recesses.

2.02 STIPULATED TESTIMONY

The government and the defendant[s] have stipulated - that is, they have agreed - that if (name of witness) were called as a witness [he][she] would testify in the way counsel have just stated. You should accept that as being (name of witness)'s testimony, just as if it had been given here in court from the witness stand.

COMMITTEE COMMENTS

See Seventh Circuit Instruction 1.07; Ninth Circuit Instruction 2.03. See generally F.J.C. Instruction 11; West Key # "Stipulations" 14(10).

There is a difference between stipulating that a witness would give certain testimony, and stipulating that certain facts are established. United States v. Lambert, 604 F.2d 594, 595 (8th Cir. 1979). Instruction 2.03, infra, covers stipulations of facts. By entering into a stipulation as to a witness's testimony, calling that person as a witness is avoided. Osborne v. United States, 351 F.2d 111, 120 (8th Cir. 1965).

Where there is stipulation as to testimony, the parties may contest the truth or accuracy of that testimony. See, United States v. Garcia, 593 F.2d 77, 79 (8th Cir. 1979). In such a situation, it may be appropriate to instruct the jury on the factual areas that remain disputed. See, e.g., United States v. Renfro, 600 F.2d 55, 59 (6th Cir.), cert. denied, 444 U.S. 941 (1979), for an example of such an instruction where only authenticity was stipulated.

2.03 STIPULATED FACTS

The government and the defendant[s] have stipulated -- that is, they have agreed -- that certain facts are as counsel have just stated. You should therefore treat those facts as having been proved.

COMMITTEE COMMENTS

See Ninth Circuit Instruction 2.04. See generally D. & B. § 11.11; F.J.C. Instruction 12; Seventh Circuit Instruction 1.07; West Key # "Stipulations" 14(10). See also, Committee Comments § 2.02, supra.

When parties enter into stipulations as to material facts, those facts will be deemed to have been conclusively proved, and the jury may be so instructed. United States v. Sims, 529 F.2d 10, 11 (8th Cir. 1976); United States v. Houston, 547 F.2d 104, 107 (9th Cir. 1976). "Stipulations of fact fairly entered into are controlling and conclusive and courts are bound to enforce them." Osborne v. United States, 351 F.2d 111, 120 (8th Cir. 1965).

A case may be submitted on an agreed statement of facts and the defendant may raise any defenses by stipulation. Such a practice, where the essential facts in the case are uncontested, has been approved as a practical and expeditious procedure. United States v. Wray, 608 F.2d 722, 724 (8th Cir. 1979), cert. denied, 444 U.S. 1048 (1980). When facts which tend to establish guilt are submitted on stipulation, the court must determine whether the consequences of the admissions are understood by the defendant and whether he consented to them. Cox v. Hutto, 589 F.2d 394, 396 (8th Cir. 1979) [stipulation to prior convictions in habitual offender action]; United States v. Terrack, 515 F.2d 558, 560-61 (9th Cir. 1975) [whole case submitted on stipulated facts]. However, the extensive examination before entry of a guilty plea under Rule 11 is ordinarily not required. Terrack, supra, 515 F.2d at 560-61, and cases cited therein; United States v. Miller, 588 F.2d 1256, 1263-64 (9th Cir. 1978), cert. denied, 440

U.S. 947 (1979); United States v. Schmidt, 760 F.2d 828 (7th Cir.), cert. denied, 474 U.S. 827 (1985). Guilty plea safeguards may be required, however, where and by such stipulation the defendant effectively admits guilt and waives trial on all issues. Schmidt, supra, 760 F.2d at 834.

Where the stipulated facts do not directly establish guilt, the court need not personally address defendants as to the voluntariness of the stipulation. United States v. Ferreboeuf, 632 F.2d 832, 836 (9th Cir. 1980), cert. denied, 450 U.S. 934 (1981), which held:

> "[W]hen a stipulation to a crucial fact is entered into the record in open court in the presence of the defendant, and is agreed to by defendant's acknowledged counsel, the trial court may reasonably assume that the defendant is aware of the content of the stipulation and agrees to it through his or her attorney. Unless a criminal defendant indicates objection at the time the stipulation is made, he or she is ordinarily bound by such a stipulation." [Case citations from Second, Seventh, Ninth and Tenth Circuits omitted.]

In Ferreboeuf, the stipulation was to one of the three necessary elements to establish the crime. See also, Loggins v. Frey, 786 F.2d 364, 367-68 (8th Cir.), cert. denied, 479 U.S. 842 (1986), upholding a stipulation that a witness was unavailable (which allowed his prior testimony to be read into evidence), where, although defendant's attorney did not consult him about the stipulation, it appeared from the record that defendant acquiesced in it and the stipulation was motivated by sound strategic reasons.

2.04 JUDICIAL NOTICE
(Rule 201, F.R.E.)

Even though no evidence has been introduced about it, I have decided to accept as proved the fact that (insert fact noticed). I believe this fact [is of such common knowledge] [can be so accurately and readily determined from (name accurate source)] that it cannot reasonably be disputed. You may therefore treat this fact as proved, even though no evidence was brought out on the point. As with any fact, however, the final decision whether or not to accept it is for you to make and you are not required to agree with me.

COMMITTEE COMMENTS

See F.J.C. Instruction 7; Ninth Circuit Instruction 2.05; United States v. Deckard, 816 F.2d 426, 428 (8th Cir. 1987). See generally D. & B. § 11.11; Seventh Circuit Instruction 1.07; Fed.R.Evid. 201; West Key # "Criminal Law" 304.

The kinds of facts which may be judicially noticed are set out in Fed.R.Evid. 201(b).

An instruction regarding judicial notice is appropriately given at the time notice is taken. In Deckard, supra, the jury was instructed at the time notice was taken that it would be instructed at the close of the case on what to do with facts judicially noticed. That part of the final charge read as follows:

"When the court declares it will take judicial notice of some fact or event, you may accept the court's declaration as evidence, and regard as proved the fact or event which has been judicially noticed, but you are not required to do so since you are the sole judge of the facts."

816 F.2d at 428.

Fed. R. Evid. 201(g), requires that the jury in a criminal case be instructed that it is not required to accept as conclusive any fact so noticed. However, failure to so instruct does not rise to the level of plain error if defendant is not prejudiced. United States v. Berrojo, 628 F.2d 368, 370 (5th Cir. 1980); United States v. Piggie, 622 F.2d 486, 488 (10th Cir.), cert. denied, 449 U.S. 863 (1980).

2.05 WIRETAP OR OTHER TAPE RECORDED EVIDENCE

[You are about to hear [have heard] tape recordings of conversations. These conversations were legally recorded, and you may consider the recordings just like any other evidence.]

COMMITTEE COMMENTS

See F.J.C. Instruction 13; Ninth Circuit Instruction 2.06. See generally, 18 U.S.C. §§ 2510-2520.

The Committee recommends that this instruction be given only if a question as to the propriety of the recording has been raised in the jury's presence.

Note that when a transcript of a tape is offered and the tape is available, the tape, rather than the transcript, controls. See Fed. R. Evid. 1002. This is covered in Instruction 2.06, infra. In situations where a transcript is utilized together with the recording, Instruction 2.06 should be given immediately after this instruction.

In United States v. McMillan, 508 F.2d 101 (8th Cir. 1974), cert. denied, 421 U.S. 916 (1975), the Court set forth the foundation requirements for use of tape recordings as evidence. The McMillan foundation requirements are directed to the government's use of recording equipment, but not to a recording found in a defendant's possession. United States v. O'Connell, 841 F.2d 1408 (8th Cir.), cert. denied, 108 S.Ct. 2857 (1988); United States v. Kandiel, 865 F.2d 967 (8th Cir. 1989).

2.06 TRANSCRIPT OF TAPE RECORDED CONVERSATION

As you have [also] heard, there is a typewritten transcript of the tape recording [I just mentioned] [you are about to hear]. That transcript also undertakes to identify the speakers engaged in the conversation.

You are permitted to have the transcript for the limited purpose of helping you follow the conversation as you listen to the tape recording, and also to help you keep track of the speakers. The transcript, however, is not evidence. The tape recording itself is the primary evidence of its own contents.

[You are specifically instructed that whether the transcript correctly or incorrectly reflects the conversation or the identity of the speakers is entirely for you to decide based upon what you have heard here about the preparation of the transcript, and upon your own examination of the transcript in relation to what you hear on the tape recording. If you decide that the transcript is in any respect incorrect or unreliable, you should disregard it to that extent.][1]

Differences in meaning between what you hear in the recording and read in the transcript may be caused by such

things as the inflection in a speaker's voice. You should, therefore, rely on what you hear rather than what you read when there is a difference.

COMMITTEE COMMENTS

See generally, United States v. McMillan, 508 F.2d 101 (8th Cir. 1974), cert. denied, 421 U.S. 916 (1975); United States v. Bentley, 706 F.2d 1498 (8th Cir. 1983), cert. denied, 467 U.S. 1209 (1984).

The transcript, absent stipulation of the parties, should not go to the jury room. See United States v. Kirk, 534 F.2d 1262 (8th Cir. 1976), cert. denied, 430 U.S. 906 (1977), 433 U.S. 907 (1977). If the accuracy of the transcript has been stipulated, the transcript may be admitted into evidence without limiting instructions. See, United States v. Crane, 632 F.2d 663, 664 (6th Cir. 1980).

NOTES ON USE

[1]This language should be included if the accuracy of the transcript is an issue.

2.07 STATEMENT BY DEFENDANT

You have heard testimony that the defendant (name) made a statement to (name of person or agency). It is for you to decide:

First, whether the defendant (name) made the statement and

Second, if so, how much weight you should give to it.

In making these two decisions you should consider all of the evidence, including the circumstances under which the statement may have been made.[1]

COMMITTEE COMMENTS

See Ninth Circuit Instruction 4.01; Eleventh Circuit Special Instruction 2.2. See also D. & B. § 15.07; F.J.C. Instruction 36; Fifth Circuit Special Instruction 4A; Seventh Circuit Instruction 3.09; Ninth Circuit Instruction 4.01. See generally, 18 U.S.C. § 3501; West Key # "Criminal Law" 405, 406 (1-3, 5-7), 409, 411, 412(1-6), 412.1(1-4), 412.2(1-5), 414, 781(1-6), 814(16), 815(8), 823(11).

The instruction uses the word "statement" in preference to the word "confession." Not all statements are "confessions," particularly from a lay person's point of view.

Pursuant to 18 U.S.C. § 3501(a), the trial judge must first make a determination as to the voluntariness of the statement (including compliance with applicable Miranda requirements), outside the presence of the jury. This may, of course, be done either pre-trial or out of the jury's presence during trial. If done during trial, no reference to the statement should be made in the jury's presence unless and until the trial judge has made a determination that the statement is admissible. If such a determination is made, the trial judge should then permit the jury to hear evidence on the issue of voluntariness and give the present instruction. The jury should not be advised that the trial judge has made an independent determination that the statement was voluntary. United States v. Standing Soldier, 538 F.2d 196, 203 (8th Cir.), cert. denied, 429 U.S. 1025 (1976); United States v. Bear Killer, 534 F.2d 1253, 1258-59 (8th Cir.), cert. denied, 429 U.S. 846 (1976). The Committee concludes that it is not necessary to instruct the jury with respect to the various specific factors enumerated in 18 U.S.C. § 3501(b).

The defendant may introduce evidence of the circumstances in which the statement is made. Crane v. Kentucky, 476 U.S. 683 (1976); United States v. Blue Horse, 856 F.2d 1037, 1039 n. 3 (8th Cir. 1988).

If the voluntariness of the statement is not an issue, the defendant is not entitled to this instruction. United States v. Blue Horse, supra, 856 F.2d at 1039.

Even though the defendant's failure to request an instruction such as this one may be a waiver of any error in the matter, see United States v. Houle, 620 F.2d 164, 166 (8th Cir. 1980), the Committee strongly recommends that if voluntariness is an issue, the instruction be given even absent a request.

"Informal" voluntary statements - that is, in the language of 18 U.S.C. § 3501(d), those made "without interrogation by anyone, or at any time at which the person . . . was not under arrest or other detention" - do not require any instruction. See United States v. Houle, supra, 620 F.2d at 166.

NOTES ON USE

[1]In a multidefendant trial this instruction should be followed by § 2.15, infra, unless the statement was made during the course of a conspiracy or was otherwise adoptive.

2.08 DEFENDANT'S PRIOR SIMILAR ACTS
(Where introduced to prove an issue other than identity)
(Rule 404(b), F.R.E.)

You [are about to hear] [have heard] evidence that the defendant previously committed [an act] [acts] similar to [the one] [those] charged in this case. You may not use this evidence to decide whether the defendant carried out the acts involved in the crime charged here. However, if you are convinced beyond a reasonable doubt, based on other evidence introduced, that the defendant did carry out the acts involved in the crime charged here, then you may use this evidence concerning [a] previous [act] [acts] to decide (describe purpose under 404(b) for which evidence has been admitted.)[1]

[Remember, even if you find that the defendant may have committed [a] similar [act] [acts] in the past, this is not evidence that [he] [she] committed such an act in this case. You may not convict a person simply because you believe [he] [she] may have committed similar acts in the past. The defendant is on trial only for the crime[s] charged, and you may consider the evidence of prior acts only on the issue of

(state proper purpose under 404(b), e.g., intent, knowledge, motive.)][2]

COMMITTEE COMMENTS

See Ninth Circuit Instruction 2.08. See also D. & B. § 14.14; F.J.C. Instruction 50; Fifth Circuit Trial Instruction 3; Seventh Circuit Instruction 3.08; Eleventh Circuit Special Instruction 3. See generally Fed. R. Evid. 404(b); West Key # "Criminal Law" 369-374, 673(5), 761(14), 783(1). See also United States v. Felix, 867 F.2d 1068, 1075 (8th Cir. 1989) (Court satisfied that earlier, but nearly identical, version of this instruction was correct as given.)

See also, Introductory Comment § 2.00, supra, concerning limiting instructions.

The Supreme Court, in Huddleston v. United States, 108 S.Ct. 1496, 1502 (1988), acknowledged the unfair prejudice that can arise from the admission of similar act evidence and noted that such prejudice could be dealt with in part through a limiting instruction. Such an instruction should be given when requested.

Prior act evidence is admissible when it is relevant to a material issue in question other than the character of the defendant, the act is similar in kind and reasonably close in time to the crime charged, there is sufficient evidence to support a finding by the jury that the defendant committed the prior act and the potential unfair prejudice does not substantially outweigh the probative value of the evidence. United States v. Anderson, 879 F.2d 369, 378 (8th Cir. 1989); United States v. Marin-Cifuentes, 866 F.2d 988, 996 (8th Cir. 1989). This Circuit follows a rule of inclusion, wherein such evidence is admissible unless it tends to prove only the defendant's criminal disposition. E.g., United States v. Kandiel, 865 F.2d 967, 972 (8th Cir. 1989); United States v. Mothershed, 859 F.2d 585, 589 (8th Cir. 1988).

While other act evidence is generally admissible to prove intent, knowledge, motive, etc., it is only admissible where such an issue is material in the case. Mothershed, 859 F.2d at 589-90; United States v. Nichols, 808 F.2d 660, 663 (8th Cir.), cert. denied, 481 U.S. 1038 (1987). Where admission of other act evidence is sought, "the proponent of

the evidence [must] articulate the basis for the relevancy of the prior act evidence and . . . the court [must] 'specify which components of the rule from the basis of its ruling and why.' United States v. Harvey, 845 F.2d 760, 762 (8th Cir. 1988) (emphasis added)." United States v. Johnson, 879 F.2d 331, 334 n. 2 (8th Cir. 1989). The extent to which a general denial places such matters in issue is not clearly resolved in this Circuit. Compare Mothershed with Marin-Cifuentes. See generally, United States v. Manganellis, 864 F.2d 528 (7th Cir. 1988).

This instruction is designed for use only in those situations where the prior acts are to be utilized for one of the state of mind purposes enumerated in Rule 404(b) (e.g., intent, motive, willfulness, absence of mistake, etc.). United States v. Burkett, 821 F.2d 1306, 1309 (8th Cir. 1987); United States v. Miller, 725 F.2d 462, 466 (8th Cir. 1984).

This instruction should not be used when the theory for admitting the evidence is to show identity. When the evidence is to be used for this purpose, use Instruction 2.09.

If the defendant's prior conviction has been admitted under Rule 609, a different limiting instruction should be given. See Instruction 2.16, infra; D. & B. § 17.13.

NOTES ON USE

[1]Use care in framing the language to be used in specifying the purpose for which the evidence can be used. See United States v. Mothershed, 859 F.2d 585, 588-89 (8th Cir. 1988) (court should specify which component of Rule 404(b) the prior similar act evidence is relevant to and explain the relationship between the prior acts and proof of that proper component).

[2]This paragraph should be given only upon request of the defendant. This portion of the instruction explains that prior similar act evidence is not admissible to prove propensity to commit crime, and defendant may want the jury so instructed. On the other hand, this portion of the instruction repeats reference to the prior act[s]. The trade-off between explanation and repetition should be made by the defendant in the first instance.

2.09 DEFENDANT'S PRIOR SIMILAR ACTS
(Where introduced to prove identity)
(Rule 404(b), F.R.E.)

You [are about to hear] [have heard] evidence that the defendant previously committed [an act] [acts] similar to [the one] [those] charged in this case. You may use this evidence to help you decide [manner in which the evidence will be used to prove identity - e.g., whether the similarity between the acts previously committed and the one[s] charged in this case suggests that the same person committed all of them].[1]

Remember, however, that the mere fact that the defendant may have committed [a similar act] [similar acts] in the past is not evidence that [he] [she] committed such [an act] [acts] in this case. The defendant is on trial for the crime[s] charged and for [that] [those] crime[s] alone. You may not convict a person simply because you believe [he] [she] may have committed some act[s], even bad act[s], in the past.

COMMITTEE COMMENTS

See S. & P. § 2.14A; see generally Fed. R. Evid. 404(b); West Key # "Criminal Law" 369.15, 372.

See also, Introductory Comment § 2.00, supra, concerning limiting instructions.

Evidence of prior crimes or acts may be admissible in some cases to prove the crime charged. See, e.g., United States v. Calvert, 523 F.2d 895, 905-07 (8th Cir. 1975), cert. denied, 424 U.S. 911 (1976); United States v. Robbins, 613 F.2d 688, 692-95 (8th Cir. 1979). For example, such evidence is admissible to prove identity when the theory for admitting the evidence is to show a common scheme, pattern or plan between the prior acts and the present offense. United States v. McMillian, 535 F.2d 1035, 1038 (8th Cir. 1976), cert. denied, 434 U.S 1074 (1978); United States v. Davis, 551 F.2d 233, 234 (8th Cir.), cert. denied, 431 U.S. 923 (1977); United States v. Weaver, 565 F.2d 129, 133-35 (8th Cir. 1977), cert. denied, 434 U.S. 1074 (1978); United States v. Mays, 822 F.2d 793, 797 (8th Cir. 1987). Such evidence is admissible where there is a "peculiar similarity" between the prior acts and the crime charged. United States v. Garbett, 867 F.2d 1132, 1135 (8th Cir. 1989).

Because similar act evidence tends not only to prove the commission of the act but also has a tendency to show defendant's bad or criminal character, undue prejudice must be avoided. This instruction, which in effect tells the jury to consider the evidence only on the issue of identity and not on the issue of character, should be given on request. See United States v. Danzey, 594 F.2d 905, 914-15 (2d Cir.), cert. denied, 441 U.S. 951 (1979); see also United States v. McMillian, supra, 535 F.2d at 1038-39.

Where similar act evidence may be admissible both on the issue of identity and for another proper purpose, Instructions 2.08 and 2.09 may need to be adapted to meet the particular situation.

NOTES ON USE

[1]The language here should specify whether the evidence is to be considered to show a common pattern, scheme or plan or for another permissible purpose relating to proof of the acts charged.

2.10 CROSS-EXAMINATION OF DEFENDANT'S CHARACTER WITNESS

You will recall that after witness (name) testified about the defendant's [reputation for] [character for] [reputation and character for] (insert character trait covered by testimony), the government attorney asked the witness some questions about whether [he] [she] knew that (Describe in brief terms the subject of the cross-examination on the character trait, e.g., defendant was convicted of fraud on an earlier occasion). Those questions were asked only to help you decide if the witness really knew about the defendant's [reputation for] [character for] [reputation and character for] (insert character trait covered by the testimony). The information developed by the government attorney on that subject may not be used by you for any other purpose.

The possibility that the defendant may have (e.g., committed fraud on an earlier occasion) is not evidence that [he] [she] committed the crime charged in this case.

COMMITTEE COMMENTS

See F.J.C. Instruction 52; D. & B. § 15.26. See generally Fed. R. Evid. 405(a); West Key # "Criminal Law" 673(2), "Witnesses" 274(1).

See also, Introductory Comment § 2.00, supra, concerning limiting instructions.

For a good treatment of this topic, see Michelson v. United States, 335 U.S. 469 (1948).

Character testimony is limited to the reputation of a defendant, not to specific instances of behavior. United States v. Koessel, 706 F.2d 271, 275 (8th Cir. 1983), citing Michelson, supra, 335 U.S. at 477. With respect to community reputation for a character trait, only reputation reasonably contemporaneous with the acts charged is relevant. United States v. Curtis, 644 F.2d 263, 268 (3d Cir. 1981), cert. denied, 459 U.S. 1018 (1982); Mullins v. United States, 487 F.2d 581, 590 (8th Cir. 1973). Cross-examination must be limited to the particular character trait placed in issue. Michelson, supra, 335 U.S. at 475-76; United States v. Curtis, supra, 644 F.2d at 268.

2.11 DISMISSAL, DURING TRIAL, OF SOME CHARGES AGAINST SINGLE DEFENDANT

At the beginning of the trial I told you that the defendant was accused of (insert number) different crimes: (Briefly describe the offenses mentioned at the commencement of trial.)[1] Since the trial started, however, [one] [two, etc.] of these charges [has] [have] been disposed of, the one(s) having to do with (describe offenses disposed of).[2] [That charge] [Those charges] [is] [are] no longer before you, and the only crime[s] that the defendant is charged with now [is] [are] (describe remaining offenses). You should not guess about or concern yourselves with the reason for this disposition. You are not to consider this fact when deciding if the government has proved, beyond a reasonable doubt, the count[s] which remain, which are (list remaining count[s]).

[The following evidence is now stricken by me, and is thus no longer before you and may not be considered by you: (Describe stricken evidence).][3]

COMMITTEE COMMENTS

See F.J.C. Instruction 16; Ninth Circuit Instruction 2.10; United States v. Beran, 546 F.2d 1316, 1319-20 (8th Cir. 1976), cert. denied, 430 U.S. 916 (1977). See generally West Key # "Criminal Law" 750, 867, 1166.22(2).

See also, Introductory Comment § 2.00, supra, concerning limiting instructions.

Such an instruction is appropriate only on rare occasions and should not be given unless requested by defendant.

NOTES ON USE

[1]If one or more counts of the same offense have been disposed of and other counts of the same offense remain, the language of this instruction should be modified.

[2]In some cases circumstances may require a more specific treatment of the reasons for dismissal.

[3]If the evidence remains admissible the jury may be so instructed. See United States v. D'Alora, 585 F.2d 16 (1st Cir. 1978) which approved the following instruction:

> "For reasons which need not concern the jury, Count II has been withdrawn from your consideration. However, the evidence you heard relating to that count may be considered by you in your deliberations on the remaining counts."

2.12 DISPOSITION, DURING TRIAL, OF ALL CHARGES AGAINST ONE OR MORE CODEFENDANT[S]

At the beginning of the trial I told you that (insert name[s]) [was] [were] [a] defendant[s] in this case. The charge[s] against defendant[s] (insert name[s]) [has] [have] been disposed of, and [he] [she] [they] [is] [are] no longer [a] [defendant[s] in this case. You should not guess about or concern yourselves with the reason for this disposition. You are not to consider this fact when deciding if the government has proved, beyond a reasonable doubt, its case against defendant[s] (name remaining defendant[s]).

[The following evidence is now stricken by me, and is thus no longer before you and may not be considered by you (describe striken evidence).][1]

COMMITTEE COMMENTS

See D. & B. §§ 10.20, 11.10; F.J.C. Instruction 17; Ninth Circuit Instruction 2.11; United States v. Schmaltz, 562 F.2d 558 (8th Cir.), cert. denied, 434 U.S. 957 (1977). See generally West Key # "Criminal Law" 768(1), 793.

See also, Introductory Comment § 2.00, supra, concerning limiting instructions.

Courts have split on the question of whether the jury should be told the reason for the codefendant's departure or told not to concern themselves with it. See discussion in United States v. Barrientos, 758 F.2d 1152, 1155-58 (7th Cir.), cert. denied, 106 S.Ct. 810 (1985). This instruction follows the holding of the Seventh Circuit in that case. However, see Wood v. United States, 279 F.2d 359, 362-363 (8th Cir. 1960) in which the court approved the trial court's advising the jury that certain co-defendants had pleaded guilty.

If the jury should become aware that a codefendant has pleaded guilty, it should be clearly instructed that it is not to consider or discuss the plea in deciding the case of the remaining defendant or defendants. Wood, Id.; United States v. Phillips, 640 F.2d 87, 91 n. 7 (7th Cir.), cert. denied, 451 U.S. 991 (1981). However, the defense may elect to forego an instruction if it desires to avoid calling attention to the plea. United States v. Francisco, 410 F.2d 1283, 1288-89 (8th Cir. 1969).

NOTES ON USE

[1]If the evidence remains admissible the jury may be so instructed. See United States v. D'Alora, 585 F.2d 16 (1st Cir. 1978).

2.13 DISPOSITION, DURING TRIAL, OF ONE OR MORE BUT LESS THAN ALL CHARGES AGAINST CODEFENDANT[S]

At the beginning of the trial I told you that [both] [all] defendants were charged, among other things, with the crimes of (describe crimes).[1] The charges of (describe disposed of charges), as against defendant[s], [has] [have] been disposed of, and [he] [she] [they] [is] [are] no longer [a] defendant[s] as to [that] [those] charge[s]. You should not guess about or concern yourselves with the reason for this disposition. You are not to consider this fact when deciding if the government has proved beyond a reasonable doubt that defendant[s] (name remaining defendant[s]) committed any of the crimes with which [he] [she] [they] [is] [are] charged, or when deciding if the government has proved beyond a reasonable doubt that defendant[s] (name remaining defendants) committed the remaining crime[s] with which [he] [she] [they] [is] [are] charged.

[The following evidence is now stricken by me, and is thus no longer before you and may not be considered by you: (describe stricken evidence).][2]

[So far as this case is concerned, you will continue to be concerned with the following charges: (describe charges).][3]

COMMITTEE COMMENTS

See D. & B. § 11.10; Ninth Circuit Instruction No. 2.11; United States v. Schmaltz, 562 F.2d 558 (8th Cir.), cert. denied, 434 U.S. 957 (1977). See generally West Key # "Criminal Law" 750, 1166.22(2).

See also, Introductory Comment § 2.00, supra, and Committee Comments § 2.12, supra.

NOTES ON USE

[1]If one or more counts of the same offense have been disposed of and other counts of the same offense remain, the language of this instruction should be modified.

[2]If the evidence remains admissible the jury may be so instructed. See United States v. D'Alora, 585 F.2d 16 (1st Cir. 1978) which approved the following instruction:

> "For reasons which need not concern the jury, Count II has been withdrawn from your consideration. However, the evidence you heard relating to that count may be considered by you in your deliberations on the remaining counts."

[3]Optional for use when there are a number of charges, and the court feels it would be helpful to "re-cap" those remaining for the jury.

2.14 EVIDENCE ADMITTED AGAINST ONLY ONE DEFENDANT

As you know, there are (insert number) defendants on trial here: (name each defendant). Each defendant is entitled to have [his] [her] case decided solely on the evidence which applies to [him] [her]. Some of the evidence in this case is limited under the rules of evidence to one of the defendants, and cannot be considered against the others.

The [testimony] [exhibit about which] you [are about to hear] [just heard], (describe testimony or exhibit), can be considered only in the case against defendant (name). You must not consider that evidence when you are deciding if the government has proved, beyond a reasonable doubt, its case against defendant[s] (name[s]).

COMMITTEE COMMENTS

See D. & B. § 10.17; F.J.C. Instruction 19; Ninth Circuit Instruction 2.12; United States v. Leach, 429 F.2d 956, 961 (8th Cir. 1970), cert. denied, 402 U.S. 986 (1971). See generally West Key # "Criminal Law" 673(2).

See also Introductory Comment § 2.00, supra, concerning limiting instructions.

Giving this type of instruction each time evidence limited to one or more defendants is admitted is an appropriate method to guard against prejudice, however such interim instructions are not required and it is within the

discretion of the trial judge to determine when interim instructions are necessary. United States v. Oxford, 735 F.2d 276, 280 (7th Cir. 1984). In particularly complex cases, the judge might consider marshalling evidence at the end of the trial, thereby identifying the limited evidence available against a particular defendant. Cf. United States v. Kelly, 349 F.2d 720, 757 (2d Cir. 1965), cert. denied, 384 U.S. 947 (1966).

An exhibit admissible against only one defendant may go to the jury room if adequate cautionary instructions are given. United States v. Martinez, 428 F.2d 86 (6th Cir.), cert. denied, 400 U.S. 881 (1970).

2.15 STATEMENT OF ONE DEFENDANT IN MULTIDEFENDANT TRIAL

You may consider the statement of defendant (name) only in the case against [him] [her], and not in the case against the other defendant[s]. What that means is that you may consider defendant (name)'s statement in the case against [him] [her] and for that purpose rely on it as much or as little as you think proper, but you may not consider or discuss that statement in any way when you are deciding if the government has proved, beyond a reasonable doubt, its case against the other defendant[s].

COMMITTEE COMMENTS

See F.J.C. Instruction 37. See also, D. & B. § 15.17; Seventh Circuit Instruction 3.10. See generally, West Key # "Criminal Law" 673(4).

See also, Introductory Comment § 2.00, supra, concerning limiting instructions.

The standard codefendant confession instruction is not as important as it once was due to the Bruton rule. Bruton v. United States, 391 U.S. 123 (1968). Bruton held that nontestifying codefendant confessions used in a joint trial which implicate another defendant on their face are so "devastating" that their effect cannot be limited by jury instructions to consider that confession only against the codefendant. Unless directly admissible, Bruton holds such confessions to be barred by the Confrontation Clause. The Bruton rule has been extended to apply to a nontestifying codefendant's confession in cases in which the confession of the defendant has been admitted, even where the confessions are "interlocking". Cruz v. New York, 481 U.S. 186, 191-93 (1987). However the fact that the confessions "interlock" may be considered in assessing whether the statements are

supported by sufficient indicia of reliability to be directly admissible against the defendant. Id. at 193-94.

In some cases, a nontestifying codefendant's confession may be admitted with a proper limiting instruction where the confession is redacted to eliminate the defendant's name and any reference to his or her existence or where the statement provides only "evidentiary linkage" to the defendant on trial. See Richardson v. Marsh, 481 U.S. 200, 211 (1987).

This instruction should not be used in connection with coconspirator declarations admitted under Rule 801(d)(2)(E) Fed.R.Ev. See, e.g. United States v. Roth, 736 F.2d 1222, 1229 (8th Cir.), cert. denied, 469 U.S. 1058 (1984), or in any other situation in which the codefendant's statement may be directly admissible against the defendant. See Cruz, supra, 481 U.S. at 193-94, citing Lee v. Illinois, 476 U.S. 530 (1986).

2.16 DEFENDANT'S TESTIMONY: IMPEACHMENT BY PRIOR CONVICTION

You [are about to hear] [have heard] evidence that the defendant (name) was previously convicted of [a] crime[s]. You may use that evidence only to help you decide whether to believe [his] [her] testimony and how much weight to give it. That evidence does not mean that [he] [she] committed the crime charged here, and you must not use that evidence as any proof of the crime charged in this case.

[That evidence may not be used in any way at all in connection with the other defendant[s]].[1]

COMMITTEE COMMENTS

See Ninth Circuit Instruction 4.06; See also D. & B. § 17.13; Seventh Circuit Instruction 3.16; F.J.C. Instruction 41. See generally West Key # "Criminal Law" 786(6), "Witnesses" 337(1-6).

See also, Introductory Comment § 2.00, supra, concerning limiting instructions.

If past crimes of the defendant are to be used to establish intent, motive or other mental element, and not for the purpose of impeachment, Instruction 2.08 should be used rather than this Instruction. If the past crimes are to be used to show a common pattern, scheme or plan as

between the prior acts and present offense, or to show the defendant's identity, Instruction 2.09, supra, should be used. For impeachment by prior conviction of a witness other than the defendant, see Instruction 2.18, infra.

NOTES ON USE

[1]For use in a multiple defendant case.

2.17 DEFENDANT'S TESTIMONY: IMPEACHMENT BY OTHERWISE INADMISSIBLE STATEMENT (HARRIS v. NEW YORK)

There has been evidence that the defendant (name) was questioned at a time prior to trial, and made certain statements. You may use that evidence only to help you decide if [he] [she] said something different earlier, and if what [he] [she] said here in court was true. You must not, however, consider what was said earlier as any proof or evidence of the defendant (name)'s guilt.

COMMITTEE COMMENTS

See F.J.C. Instruction 42. See generally West Key # "Witnesses" 390.

See also Introductory Comment § 2.00, supra, concerning limiting instructions.

A statement obtained in violation of Miranda may constitutionally be used for impeachment purposes. Oregon v. Hass, 420 U.S. 714 (1975); Harris v. New York, 401 U.S. 222 (1971); Clark v. Wood, 823 F.2d 1241, 1246 (8th Cir.), cert. denied, 108 S.Ct. 334 (1987). The trial judge should stress that the government cannot use the prior statement to prove the defendant's guilt; it can only use it to impeach. Of course, the statement can only be used if the defendant takes the stand and testifies contrary to the prior statement. Where the statement is used for impeachment, the standard for admissibility is voluntariness. Oregon v. Elstad, 470 U.S. 298, 307-08 (1985). If the defendant raises a voluntariness issue with respect to the prior statement, it will also be necessary upon defendant's request to instruct the jury appropriately on that issue

(see Committee Comments § 2.07, supra). However, absent a request and a clear invocation of 18 U.S.C. § 3501(a) at trial, such an instruction is not required. United States v. Diop, 546 F.2d 484, 485-86 (2d Cir. 1976). Presumably in those circumstances it would also be necessary, pursuant to 18 U.S.C. § 3501, for the trial judge to conduct a hearing out of the presence of the jury, and make a finding on the issue, before allowing the prior statement to be used even for impeachment purposes.

2.18 IMPEACHMENT OF WITNESS: PRIOR CONVICTION

You have heard evidence that witness (name) was once convicted of a crime. You may use that evidence only to help you decide whether to believe the witness and how much weight to give [his] [her] testimony.

COMMITTEE COMMENTS

See F.J.C. Instruction 30; Ninth Circuit Instruction 4.08. See also, D. & B. § 17.09. Fifth Circuit Basic Instruction 7H; Seventh Circuit Instruction 3.17. See generally Fed. R. Evid. 609; West Key # "Witnesses" 344(1-5), 345(1-4).

See also Introductory Comment § 2.00, supra, concerning limiting instructions.

Where the witness is the defendant, Instruction 2.16, supra, should be used.

2.19 WITNESS WHO HAS PLEADED GUILTY

You have heard evidence that witness (name) has pleaded guilty to a crime which arose out of the same events for which the defendant is on trial here. You must not consider that guilty plea as any evidence of this defendant's guilt. You may consider that witness's guilty plea only for the purpose of determining how much, if at all, to rely upon that witness's testimony.[1]

COMMITTEE COMMENTS

See generally West Key # "Criminal Law" 655(1), 673(3), 1170 1/2(1), 1173.2(9).

See also, Introductory Comment § 2.00, supra, and Committee Comments § 2.12, supra, concerning a codefendant's guilty plea.

Evidence that a codefendant has pleaded guilty may not be used as substantive proof of a defendant's guilt. However, such evidence is admissible to impeach, to show the witness's acknowledgement of participation in the offense, or to reflect on his credibility. In such circumstances the jury should be instructed that the evidence is received for one or more of these purposes alone, and that the jurors are not to infer the guilt of the defendant. United States v. Roth, 736 F.2d 1222, 1226 (8th Cir.), cert. denied, 469 U.S. 1058 (1984). See also Gerberding v. United States, 471 F.2d 55, 60 (8th Cir. 1973); United States v. Wiesle, 542 F.2d 61, 62-63 (8th Cir. 1976); Wallace v. Lockhart, 701 F.2d 719, 725-26 (8th Cir.), cert. denied, 464 U.S. 934 (1983).

However, the admission of such evidence without a limiting instruction is not reversible error if defense counsel did not request an instruction and if the evidence was introduced and used for a proper purpose. Gerberding v. United States, supra, 471 F.2d at 60; United States v. Wiesle, supra, 542 F.2d at 63; United States v. Roth, supra, 736 F.2d at 1226-27. In Roth it was held that a proper purpose of disclosing the plea agreement and cooperation is to diffuse any attempt to show bias on cross-examination.

For a discussion of impeachment of a witness by a prior inconsistent statement which also incriminates the defendant and appropriate limiting instructions, see United States v. Rogers, 549 F.2d 490, 494-98 (8th Cir. 1976), cert. denied, 431 U.S. 918 (1977).

NOTES ON USE

[1]Such evidence may also be used to show the witness' acknowledgement of participation in the offense. United States v. Roth, 736 F.2d 1222, 1226 (8th Cir.), cert. denied, 469 U.S. 1058 (1984). If admitted for that purpose, the instruction should be so modified.

2.20 DEFENDANT'S PREVIOUS TRIAL

You have heard that there was a previous trial of the defendant[s] for the crime[s] charged here. Keep in mind, however, that you must decide this case solely on the evidence presented to you in this trial. The fact of a previous trial must have no effect on your consideration of this case.

COMMITTEE COMMENTS

See D. & B. § 10.04; F.J.C. Instruction 14; Ninth Circuit Instruction 2.07. See also, United States v. Hykel, 461 F.2d 721, 726 (3d Cir. 1972); Carsey v. United States, 392 F.2d 810, 812 (D.C. Cir. 1967). See generally, West Key # "Criminal Law" 713, 768(1).

See also, Introductory Comment § 2.00, supra, concerning curative instructions.

This instruction should not be given unless the jury has been informed of the previous trial and the instruction has been specifically requested by the defense.

2.21 DEFENDANT'S PHOTOGRAPHS: "MUG SHOTS"

The witness has testified that [he] [she] viewed a photograph of the defendant (name) which was shown to [him] [her] by the police. The police collect pictures of many people from many different sources and for many different purposes. The fact that the police had the defendant's picture does not mean that [he] [she] committed this or any other crime, and it must have no effect on your consideration of the case.

COMMITTEE COMMENTS

See D. & B. § 10.15; F.J.C. Instruction 15; Ninth Circuit Instruction 2.09. See generally, United States v. Runge, 593 F.2d 66, 69 (8th Cir.), cert. denied, 444 U.S. 859 (1979).

See also, Introductory Comment § 2.00, supra, concerning curative instructions.

This instruction should not be given unless specifically requested by the defense.

2.22 DISCHARGE OF DEFENSE COUNSEL DURING TRIAL

Even though the defendant (name) was at first represented by a lawyer, [he] [she] has decided to continue the trial representing [himself] [herself] and not to use the services of a lawyer. [He] [She] has a right to do that. [His] [Her] decision has no bearing on whether [he] [she] is guilty or not guilty, and it must have no effect on your consideration of the case.

COMMITTEE COMMENTS

See F.J.C. Instruction 6.

See also, Introductory Comment § 2.00, supra, concerning curative instructions.